

1901 ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.  
 April 2. THE ROCHESTER AND PITTS- }  
 BURG COAL AND IRON COM- } APPELLANTS ;  
 PANY (PLAINTIFFS)..... }  
 AND  
 THE SHIP GARDEN CITY,  
 (DEFENDANT) . . . . . RESPONDENT.  
 (THOMAS NIHAN,  
 REGISTERED OWNER,)

*Admiralty law—Necessaries—Owner domiciled in Canada—Jurisdiction.*

*Held*, (affirming the judgment appealed from) that no action will lie on the Admiralty side of the Exchequer Court against a ship for necessaries when the owner of the ship at the time of the institution of the action is domiciled in Canada.

APPEAL from a judgment of the Local Judge in Admiralty for the Toronto Admiralty District.

The facts of the case are stated in the report of the case below (1), and in the reasons for judgment herein.

March 16th, 1901.

*W. M. German, K.C.* for appellants :

We submit that the action was properly taken against the ship. The 'owner' within the meaning of the fifth section of *The Admiralty Act, 1861*, (24 Vict. c 10) is the person who has control of the ship and the crew under the charterparty. (Cites the *Ella A. Clark* (2)). No personal action would lie against Nihan, although one may lie against the charterers ; but undoubtedly there is an action *in rem* against the boat. The ship was *de jure* owned by the charterers. (Cites *Lloyd v. Guibert* (3) ; *The Tasmania* (4) ; *Baumwoll Manufactur v. Furness* (5) ; *Hutton v. Bragg* (6)).

(1) See *ante* p. 34

(2) Br. & Lush. 32.

(3) L. R. 1 Q. B. 115.

(4) 13 Prob. D. 110.

(5) [1893] A. C. 8.

(6) 7 Taun. 14.

*J. A. Wright* for the respondents, citing the *Elta A. Clark* (1); *The Pacific* (2).

*A. L. Colville* followed for the respondents;

If the appellants had sued the master who ordered the coal, the master in turn could not have maintained an action *in rem* for necessaries, because the legal owner of the ship was at the time domiciled in Canada. Clearly, the court has no jurisdiction in this case, under the facts and circumstances. *Fletcher v. Brad-dick* (3).

*W. M. German K.C.* replied.

THE JUDGE OF THE EXCHEQUER COURT now (April 2nd, 1901) delivered judgment.

I think that the judgment appealed from is right. It is well settled law that independently of statute no action will lie against a ship for necessaries supplied to it. By *The Colonial Courts of Admiralty Act*, 1890, (53-54 Victoria (U.K.) c. 27) a Colonial Court of Admiralty has, subject to the Act, jurisdiction over the like places, persons, matters and things, as the High Court in England has (4); and any enactment in an Act of the Imperial Parliament referring to the Admiralty jurisdiction of the High Court in England, when applied to a Colonial Court of Admiralty in a British possession, shall be read as if the name of that possession were substituted for England and Wales (5). There are two Acts of the Imperial Parliament under which the High Court in England has jurisdiction to decide claims for necessaries supplied to ships. The earlier of the two Acts. 3 & 4 Vict. c. 65, s. 6, applies only to foreign vessels, and need not be referred to more particularly. The second is *The Admiralty*

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(1) Br. & Lush. 32.

(3) 2 B. & P. (N.R.) 182.

(2) Br. & Lush. 243.

(4) Sec. 2 (2).

(5) Sec. 2 (3) a.

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*Act*, 1861, (24 Vict. c. 10), the fifth section of which, so far as it is necessary to refer to it, reads as follows :

“The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales.”

This court, therefore, has no jurisdiction over the claim in question here if it appears that at the time of the institution of the cause any owner or part owner of the ship was domiciled in Canada. This cause was instituted in June, 1900, and at that time the defendant Thomas Nihan was the owner of the ship, and was domiciled in Canada. It is said, however, that in 1896, when the debt for which the ship was arrested was incurred, the charterers of the ship, and not Nihan, were the owners of the ship; and it is contended that they must, in respect of such debt, be taken to be the owners within the meaning of the statute. In support of the contention the case of *The Ella A. Clark* (1) is relied on. Dr. Lushington's reasons in that case have been the subject of some unfavourable comment in the Court of Appeal in the case of *The Mecca* (2); but taking the decision as it stands it will be seen that in that case the court had jurisdiction under 3 & 4 Vict. c. 6, s. 6, in respect of necessaries supplied to the ship when it was a foreign ship, and it was held that this jurisdiction was not defeated by 24 Vict. c. 10, s. 5, although before the institution of the action the ship had been transferred to a British owner domiciled in England. Here, however, the jurisdiction depends wholly upon the latter Act, and the statutes making it applicable to this court; and it is obvious that in

(1) Brown & Lush. 32.

(2) [1895] Prob. D. at p. 116.

1900, at the time of the institution of this cause, the charterers for the season of 1896, who had parted with the possession and all control over the ship were not the owners thereof. It is not even necessary to consider how far and in what sense they were in 1896 the owners. There being at the time of the institution of the cause an owner of the ship domiciled in Canada, it is clear that the court has no jurisdiction.

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*Appeal dismissed with costs.*

Solicitor for appellants: *W. M. German.*

Solicitor for respondents: *M. J. McCarron.*